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Supreme Court, U.S.
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No. 04-923

IN THE

Supreme Court of the United States

MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.,
Petitioner,

v.

THE UNITED STATES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITIONER'S REPLY BRIEF

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INTRODUCTION

The government says that there is no split implicated in this case because no court has interpreted the precise statute at issue here—28 U.S.C. § 1961(c)(2)—in a manner contrary to the Federal Circuit's opinion below. There is a very good reason for this: the Federal Circuit has *exclusive* appellate jurisdiction to hear virtually every suit based on § 1961(c)(2) because the Court of Federal Claims has *exclusive* jurisdiction to hear all but the most miniscule suits for money against the United States. See *id.* § 1346(a)(2). As Mobil Exploration & Producing Southeast, Inc. (MOEPSI) noted in its petition, the Federal Circuit's exclusive jurisdiction to hear certain cases against the government—rather than providing a basis to deny certiorari—has always provided an affirmative basis for this Court to grant review. Pet. 3-4, 11. Unless the Federal Circuit chooses to reconsider its holding in this case in some future case, there may never again be another opportunity for this Court to resolve the meaning of § 1961(c)(2).

Moreover, the government does not dispute that the Federal Circuit's opinion *does* conflict with other courts of appeals on important general questions regarding the proper interpretation of waivers of sovereign immunity. Two courts of appeals have held that a waiver of sovereign immunity is not ambiguous if there is only one reading of the statute that does not render the statute superfluous. Nor does the government dispute that, in this case, there is only one reading of § 1961(c)(2) that does not render that provision superfluous. Had the Federal Circuit followed the approach of the other courts of appeals, it would have found that § 1961(c)(2) unambiguously waives the government's immunity from this suit.

Finally, the government asks this Court to overlook the Federal Circuit's second holding—that a waiver of sovereign immunity is not valid unless money has already been

appropriated to pay any judgment that might arise from the waiver—on the ground that it is only an alternative holding. Although this is true, it provides even more reason for this Court to review this case. The Federal Circuit's alternative holding upsets 150 years of litigating practice against the government, as well as implicates a clear 2-2 circuit split. This is not, in other words, a case where a correct or splitless alternative holding would insulate a lower court's opinion from this Court's review. Rather, both holdings in this case are incorrect, implicate circuit splits, and provide sufficient bases for this Court's review.

ARGUMENT

I. THE FEDERAL CIRCUIT'S DECISION CONFLICTS WITH DECISIONS BY OTHER COURTS OF APPEALS HOLDING THAT A STATUTORY WAIVER OF SOVEREIGN IMMUNITY IS NOT AMBIGUOUS IF THE COMPETING READING RENDERS LANGUAGE SUPERFLUOUS.

The government admits that the Federal Circuit's interpretation of § 1961(c)(2) renders every single word in that provision superfluous. Indeed, the government says that Congress enacted § 1961(c)(2) because it wanted to be "doubly sure that its intent [would] be given effect." Opp. 9.

In defending the decision below, the government does not dispute that the Federal Circuit's holding, and the reasoning behind it, is in direct conflict with that of two other courts of appeals. Specifically, both the Seventh and Eighth Circuits have held that a waiver of sovereign immunity is unambiguous if the competing reading of the statute renders language superfluous. See *Ortloff* v. *United States*, 335 F.3d 652, 659 (7th Cir. 2003) (finding unambiguous waiver of sovereign immunity because government's competing interpretation "would render superfluous" statutory language), *cert. denied*, 540 U.S. 1225 (2004); *Kaffenberger* v. *United*

States, 314 F.3d 944, 953 (8th Cir. 2003) (finding unambiguous waiver of sovereign immunity because government's competing interpretation "renders the above quoted portion of [the statute] insignificant, if not wholly superfluous" (internal quotation marks omitted)).

The government's only response to this 2-1 conflict is to note that the other decisions did not "involve[] the statutory scheme at issue here," Opp. 11. As noted above, however, this argument does not militate against this Court's review because the Federal Circuit has exclusive jurisdiction over suits based on § 1961(c)(2) in all but the most improbable cases. The government does not respond to—let alone dispute—this point.

Moreover, the Federal Circuit's holding also conflicts with this Court's teaching in *United States* v. *Nordic Village, Inc.*, 503 U.S. 30 (1992). In that case, this Court rejected as implausible one possible interpretation of a waiver of sovereign immunity because it "violate[d] the settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect." *Id.* at 36. The government argues that *Nordic Village* is inapposite because in that case the superfluous reading was in favor of the waiver of immunity, whereas in this case the superfluous reading is against the waiver. Opp. 10. But this is a distinction without a difference. The question here is whether the Federal Circuit's competing interpretation of § 1961(c)(2) is plausible—if it is not, then § 1961(c)(2) is not ambiguous. See *Nordic Village*, 503 U.S. at 37. This Court's point in *Nordic Village* was that a superfluous reading is *not* a plausible one. Thus, the Federal Circuit's conclusion otherwise clearly conflicts with the reasoning of *Nordic Village*.[1]

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[1] The government repeats the Federal Circuit's contention that it is plausible to read § 1961(c)(2) in a manner that renders it superfluous because other sections of § 1961 are superfluous. Opp. 9. The

In any event, the Federal Circuit's conclusion that the government's reading of § 1961 is plausible is plainly wrong even apart from the fact that it reads that provision out of the U.S. Code. The government argues that the language in § 1961(b) that says "except as provided in section 2516(b) . . . and section 1304(b)" limits the authorization of interest on "all final judgments" of the Federal Circuit in § 1961(c)(2) to only the small set subset of Federal Circuit judgments referenced in §§ 2516(b) and 1304(b)—judgments affirmed by this Court on a petition for writ of certiorari filed by the government. Opp. 8. But this is not a plausible reading of the word "except." The presence of the word "except" in subsection (b) must mean that there is content to subsection (b) *outside* the class of cases referenced by the "except" clause. That is, subsection (b) must refer to cases other than those referenced by sections 2516(b) and 1304(b).[2] The government reads the word "except" in subsection (b) to mean that interest shall be authorized "only" as already provided in sections 2516(b) and 1304(b). See Opp. 5 ("Section 1961(c)(2) waives immunity *only* . . . on judgments issued by the Federal Circuit that are affirmed by this Court after review on petition of the United States . . . ." (emphasis added)). But, of course, as Judge Prost noted in dissent, this

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government does not respond, however, to MOEPSI's argument that these other purported superfluities codify judge-made rules—rather than other provisions of the U.S. Code—and, therefore, are not provisions for which it would have been redundant for Congress to have enacted. *See* Pet. 17 & n.8.

[2] The government suggests that the "except" clause might be read to refer to "the only category of cases in which interest is authorized against the United States, leaving the daily computation rule to operate in non-government cases." Opp. 8. This theory—that the "except" clause refers to all of the provisions on which interest has been authorized against the government—is plainly wrong. There are any number of other statutory provisions besides the ones referenced in § 1961(b) that authorize interest on judgments against the government. *See, e.g.*, 5 U.S.C. §5596(b)(2); 28 U.S.C. § 2412(f); 31 U.S.C. § 3728(c); 41 U.S.C. § 611; 42 U.S.C. § 1395oo(f)(2); *id.* § 2000e-16(d); *id.* § 9606(b)(2).

is the very *opposite* of the meaning of "except." Pet. App. 31a ("The majority's . . . reading of the statute effectively requires amending 'except as provided in' to read 'subject to.'"). Thus, the government's reading of the statute is implausible even apart from the fact that, in order to accept it, the Federal Circuit had to read § 1961(c)(2) entirely out of the U.S. Code.[3]

The government tries to defend its interpretation by arguing that there is no evidence in the legislative history to support MOEPSI's reading of the statute. Opp. 6 ("There is no evidence that Congress affirmatively sought to effect that kind of dramatic expansion of the monetary liability of the United States."). The responses to this effort are twofold.

First, it is not in accordance with any principle of statutory interpretation that has the support of this Court to *require* legislative history to *corroborate* the plain meaning of the text of an Act of Congress. See *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 385, n.2 (1992) ("[L]egislative history need not confirm the details of changes in the law effected by statutory language before we will interpret that language according to its natural meaning."). To do so, of course, puts the inquiry exactly backwards. If the text is unambiguous, this Court interprets the statute in that manner, regardless of whether there is no legislative history to corroborate that reading, and, indeed, even if there is legislative history to the contrary. See *BedRoc Ltd., LLC* v. *United States*, 541 U.S. 176, 183 (2004) ("[O]ur inquiry

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[3] The government asserts that the Federal Circuit's reading of the statute is "consistent with decisions of other circuits," Opp. 8, but this is not true. In *Transco Leasing Corp.* v. *United States*, 992 F.2d 552 (5th Cir. 1993), the court was considering a claim for interest from a *district court* judgment under § 1961(a), and, therefore, not only made no holding with respect to § 1961(c)(2), but actually *allowed* the claim for interest. Similarly, in *Thompson* v. *Kennickell*, 797 F.2d 1015 (D.C. Cir. 1986), the court was considering only a claim for interest from a district court judgment under § 1961(a).

begins with the statutory text, and ends there as well if the text is unambiguous."). As Judge Prost put it in dissent, "[t]o deny a clear statute its force based on the absence of legislative history would be an example of the tail wagging the dog." Pet. App. 32a.

Second, this is all the more true in the context presented here, which is an interpretation of a statute waiving sovereign immunity. Any waiver of sovereign immunity must be unambiguous. See, *e.g.*, *Library of Congress* v. *Shaw*, 478 U.S. 310, 314 (1986). At the same time, legislative history is not consulted by this Court unless a statute is already ambiguous. See, e.g., *BedRoc Ltd.*, 541 U.S. at 183. Thus, as this Court has held, legislative history is irrelevant to the interpretation of a waiver of sovereign immunity. See, *e.g.*, *Nordic Village*, 503 U.S. at 37 ("Contrary to respondent's suggestion, legislative history has no bearing on the ambiguity point.").[4]

This Court should grant the petition and reverse the Federal Circuit. The Federal Circuit's decision in this case was wrong, and it conflicts with two other courts of appeals. The

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[4] It should also be noted that the government's reading of the legislative history is not the only one. To begin with, the government's reading is based entirely on the views of one Senator who said he wished to keep the "'status quo'" in enacting the Federal Courts Improvement Act of 1982 (FCIA). Opp. 7. Of course, the intentions of one member of Congress are not reflective of the intentions of the other 534 members, not to mention the intentions of the President when he signed the FCIA. *See Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980) ("[O]rdinarily even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history."). Moreover, it is clear that Senator Grassley did not mean that the FCIA would retain the "status quo" on post-judgment interest in all cases because the FCIA undeniably altered the authorization of post-judgment interest in other cases besides the situation at issue here. For example, the Act repealed Title 28, Section 2411(b), which had authorized interest on Court of Claims judgments in Little Tucker Act and Federal Tort Claims Act cases. *See Thompson*, 797 F.2d at 1019.

only reason it did not open a conflict with regard to the specific statute at issue here is because the Federal Circuit has virtually exclusive jurisdiction to hear suits based on § 1961(c)(2).

II. THE FEDERAL CIRCUIT'S DECISION CONFLICTS WITH DECISIONS BY OTHER COURTS OF APPEALS HOLDING THAT AN APPROPRIATION IS NOT NECESSARY IN ORDER FOR CONGRESS TO WAIVE THE GOVERNMENT'S IMMUNITY.

The government argues that the Federal Circuit's alternative holding "is not necessary to the decision below" and, therefore, "provides no basis for review." Opp. 11. The government is correct in observing that this Court often declines to review erroneous initial holdings that implicate circuit splits when the overall judgment of the court below is insulated by an alternative holding that is either correct or is not implicated in a split. This is not the case here. In this case, the Federal Circuit's alternative holding is clearly wrong and implicates a 2-2 circuit split in its own right. See Pet. 18-25.

The government does not deny that the Federal Circuit's holding that "[t]here can be no unequivocal waiver of sovereign immunity for post-judgment interest . . . if Congress has not clearly appropriated funds with which the government can pay the interest," Pet. App. 17a, not only disrupts 150 years of practice against the government, but also conflicts with explicit holdings of two other courts of appeals and a plurality decision of this Court.

Instead, the government argues that the Federal Circuit's holding can be salvaged because, in this particular case, the statutory waiver of sovereign immunity "incorporates the terms of the Judgment Fund statute by reference." Opp. 12. The government does not respond, however, to what MOEPSI pointed out in the petition: the provision of the Judgment

Fund statute that is incorporated by reference in § 1961—namely, § 1304(b)—is a provision that has *nothing* to do with the Federal Circuit judgment in this case. Pet. 23-24. Section 1304(b) simply says that *if* interest is sought "on a judgment of the Court of Appeals for the Federal Circuit . . . under section 2516(b)," *then* the appropriation in §1304(a) must be paid on interest over a more limited period of time. 31 U.S.C. § 1304(b)(1)(B). Section 1304(b) says nothing about the appropriation in cases that do not arise under § 2516(b)—*e.g.*, judgments of the Federal Circuit, like this one, that were not affirmed by this Court on a petition by the government. Thus, the cross reference to § 1304(b) in § 1961(b) is entirely beside the point. Moreover, it bears repeating that the cross reference to § 1304(b) in § 1961(b) is an *exception* to the computation rule that otherwise applies for interest on Federal Circuit judgments. See 28 U.S.C. § 1961(b). Thus, the cross reference is only relevant in one of the exceptional cases, of which, again, this is not one.

Once the red herring of the cross reference is put to one side, it is clear—and the government does not dispute this—that the Federal Circuit's alternative holding is in conflict with two other courts of appeals—including one decision authored by then-Judge Ginsburg—creating a 2-2 split on this question. See *Trout* v. *Garrett*, 891 F.2d 332, 335 (D.C. Cir. 1989) (R.B. Ginsburg, J.) ("We find no tenable support for the notion that Congress designed the judgment fund measure to retract or limit duly enacted waivers of sovereign immunity . . . ."); *Rosenfeld* v. *United States*, 859 F.2d 717, 726-27 (9th Cir. 1988) ("The Judgment Fund statute is not a superseding limitation on the government's waiver of sovereign immunity."). Nor can the government dispute that the Federal Circuit's alternative holding conflicts with a plurality decision of this Court. See *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 568-71 (1962) (plurality) (deciding that lack of an appropriation did not alter otherwise valid waiver of sovereign immunity because the "good faith of the United

States" usually ensured that any judgment would eventually get paid).

This Court should grant the petition and resolve these conflicts.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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